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Workmen's Compensation—A New "In the Course of Employment" Concept: *Eliker v. D.H. Merritt & Sons*, 195 Neb. 154, 237 N.W.2d 130 (1975)

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Note

Workmen's Compensation—A New "In the Course of Employment" Concept

Eliker v. D.H. Merritt & Sons, 195 Neb. 154, 237 N.W.2d 130 (1975).

I. INTRODUCTION

In *Eliker v. D.H. Merritt & Sons*,[1] the Nebraska supreme court held that workmen's compensation should be denied to a claimant who offered proof that he received a back injury while engaged in his usual work activities, but who failed to show exactly what he was doing at the time of the injury. The court found that the claimant had failed to satisfy the requirement that the injury arise out of and in the course of the employment.[2] This represents a new interpretation of the requirement that the employee's injury occur "in the course of employment." The new interpretation introduces factors which before were relevant only to the requirement that the employee experience an "accident." In reaching its decision, the court reviewed the trial court's findings of fact, and thus departed from the established standard of review for workmen's compensation cases.

This note will examine the *Eliker* decision in the context of prior case law and statutory amendments to determine the effect of the holding on substantive and procedural aspects of workmen's compensation in Nebraska.

II. THE CASE

The plaintiff, Adam Charlie Eliker, was employed as a yard foreman by D.H. Merritt & Sons, a building supply company. Eliker's duties included loading and unloading one-hundred-pound sacks of sand, plaster, and cement. The work involved extensive bending, stooping, and twisting.

On the day in question, the plaintiff went to work at 7 a.m., feeling fine. At about 9 a.m. his neck began to hurt, but he was

1. 195 Neb. 154, 237 N.W.2d 130 (1975).
2. *Id.* at 160, 237 N.W.2d at 134.

unable to pinpoint exactly what he was doing at the time the pain started.[3] By midafternoon the pain was so great that Eliker left work. The next day he was hospitalized and remained there for a week. He went back to work two weeks after his release from the hospital. The day after his return he passed out while working and was taken home. He later returned to the hospital, where a myelogram was performed, revealing a herniated disc. The attending physician testified that he believed, with reasonable medical certainty, that the injury was related to the plaintiff's work activity.

After a hearing before a single judge of the compensation court, the action was dismissed. Upon rehearing, the court en banc reversed and awarded compensation for medical bills, temporary total and permanent partial disability. This award was affirmed by the district court on appeal.

The Nebraska supreme court reversed and dismissed on the grounds that the plaintiff had failed to establish that the accident arose out of and in the course of the employment.

Justice McCown dissented, stating that the reversal was based on a re-evaluation of factual determinations that were adequately supported by the evidence, and which, therefore, should not have been disturbed on appeal.[4]

III. THE SUPREME COURT'S REASONING

The court began its analysis from the basic premise that in any compensation case the plaintiff has the burden of proving by a preponderance of the evidence that the disability was caused by an accident arising out of and in the course of employment.[5] Three material elements must be established:[6] (1) that an accident occurred, (2) that the accident caused the disability, and (3) that the accident arose out of and in the course of employment.

In *Eliker*, the court's interpretation of the "arising out of and in the course of" requirement re-established the necessity of proof of

3. When asked what he was doing at the time the pain came on, Eliker answered, "All of the normal work that I usually always do." Asked to describe what that was, he replied, "Well, lifting the bags and all the other—all the other work that there is there to do." *Id.* at 156, 237 N.W.2d at 132.
4. *Id.* at 161, 237 N.W.2d at 135.
5. *Id.* at 157, 237 N.W.2d at 133. This rule is well established in workmen's compensation law. *See, e.g.*, Satterfield v. Nagel, 186 Neb. 332, 333, 183 N.W.2d 237, 240 (1971); Schoenrock v. School Dist., 179 Neb. 621, 623, 139 N.W.2d 547, 549 (1966); Wheeler v. Northwestern Metal Co., 175 Neb. 841, 845, 124 N.W.2d 377, 380 (1963).
6. Dike v. Betz, 181 Neb. 580, 587, 149 N.W.2d 750, 754 (1967).

a specific external event, a requirement that was legislated out of th statutory definition of "accident" in 1963.[7]

A. The Accident Requirement

The original version of the Nebraska Workmen's Compensation Act defined an accident as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."[8]

Early cases decided under this statutory definition held that an unexpected internal injury was compensable whether or not it was caused by an external event.[9] After 1941, however, the Nebraska supreme court consistently held that proof that some external event—a slip, trip, fall, or exertion greater than that normally incident to the employment—had caused the injury was necessary to satisfy the accident requirement as defined by statute.[10]

In 1963, the workmen's compensation statute was amended and the definition of accident was changed to "an unexpected or unforeseen *injury* happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."[11] The modification was intended to eliminate the requirement of an external event as a condition precedent to compensation for an injury, and to re-establish that any unexpected injury arising out of and in the course of the employment should be compensable under the statute.[12]

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7. *See* Section III-A *infra.*
8. *See* Act of Apr. 21, 1913, ch. 198, § 52(b), [1913] Neb. Laws 601.
9. *See, e.g.*, Dymak v. Haskins Bros., 132 Neb. 308, 312, 271 N.W. 860, 862 (1937).
10. *See, e.g.*, Pruitt v. McMaken Transp. Co., 175 Neb. 477, 480, 122 N.W.2d 236, 239 (1963).
11. Act of July 5, 1963, ch. 287, § 1, [1963] Neb. Laws 862, *amending* NEB. REV. STAT. § 48-151 (Reissue 1960) (emphasis added.)
12. *See* Gradwohl, *Workmen's Compensation: An Analysis of Nebraska's Revised "Accident" Requirement*, 43 NEB. L. REV. 27 (1963), in which the author states:

> The overwhelming legislative purpose behind the 1963 amendment was to eliminate the arbitrary factual situations arising under the slip, trip or fall rules which preclude recovery for work injuries caused by ordinary exertion or strain. . . . The injured workman who can prove factually that his employment caused him injury should be entitled to compensation regardless of whether the injury involved an internal body failure or external cause.

Id. at 35. This intent was expressed in the Statement of the Judiciary Committee on LB 497:

> At one time the Nebraska court favored the more liberal rule which is law in a great majority of the states; but in

This rule was recognized in *Harmon v. City of Omaha*,[13] a 1968 case, in which the Nebraska court stated:

> The substitution of the word *injury* for *event* has eliminated the necessity of proof of an event external to the body as a cause of the injury. The effect of the amendment is to liberalize the act and bring it into conformity with the compensation laws of many other states.[14]

Apparently the evidence in *Harmon* linked the injury to a specific activity of the claimant.[15] However, the same general rule was applied a year later in *Brokaw v. Robinson*[16] to allow compensation when the testimony did not conclusively link the claimant's injury to any specific event.[17] Regarding the accident requirement, the court stated:

> The change in the workmen's compensation statute clearly removes the necessity of finding a single traumatic event as the cause of an injury. The "by accident" requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unforeseen, and happened suddenly and violently.[18]

The court in *Eliker* recognized this standard for determining the accidental nature of an injury, and conceded that the injury was the result of an accident.[19]

> the last two decades our Supreme Court has construed, generally, that inner bodily injuries caused by exertion are not compensable unless the employee obtains such in connection with a slip, trip, or fall.
>
> This narrow court interpretation does not do justice in many cases and is not in harmony with the majority of opinions in other states under workmen's compensation law.

Hearings on L.B. 497 Before the Comm. on the Judiciary, Neb. Legis., 73d Sess., Committee Statement (May 22, 1963).

13. 183 Neb. 352, 160 N.W.2d 189 (1968).
14. *Id.* at 354, 160 N.W.2d at 191.
15. The opinion does not indicate what testimony was offered, but the court's summary of the facts indicates that the claimant's back injury was related to an accident occurring when she bent down to pick up some wire baskets from the floor.
16. 183 Neb. 760, 164 N.W.2d 461 (1969).
17. In *Brokaw*, the plaintiff, a farm worker, experienced physical strain after moving a portable cattle chute. He finished work that day, but when he awoke the next morning it was discovered that he had suffered a stroke. Physicians' testimony to the effect that moving the chute may have been a factor contributing to the stroke was held sufficient to support an award of benefits. *Id.* at 762-63, 164 N.W.2d at 464.
18. *Id.* at 763, 164 N.W.2d at 464.
19. 195 Neb. at 158, 237 N.W.2d at 133.

B. Causation

The second material element which the plaintiff must prove is that the accident caused the disability in question. Eliker's doctor testified that he definitely believed that the injury was trauma-related, and that he believed with reasonable medical certainty that the injury was "definitely related" to the plaintiff's work activity. If there was any question as to whether this testimony was sufficient to meet judicial standards for causation,[20] the court made no mention of failure of proof in this area as a possible basis for its denial of compensation.[21] Furthermore, there was no indication that the plaintiff's evidence was contradicted or inconsistent as has often been true in cases where the proof of causation has been insufficient.[22]

C. Arising Out of and in the Course of Employment

The basis of the court's holding was that Eliker had failed to prove that the accident arose out of and occurred in the course of his employment. The terms are used conjunctively in the Nebraska statute, and a claimant must prove both factors before compensation will be awarded.[23] The Nebraska supreme court has often stated that whether an accident arises out of and in the course of employment must be determined by the facts of each case,[24] and that there

20. *See* Welke v. City of Ainsworth, 179 Neb. 496, 138 N.W.2d 808 (1965), where the Nebraska supreme court held testimony that an accident "could have caused" the injury and that the injury was "probably due" to the accident sufficient to establish causation. The court stated that to require a greater degree of proof in a workmen's compensation case than in a tort case would be to thwart the purpose of the workmen's compensation statute. *Id.* at 503, 138 N.W.2d at 811.
21. The court, basing its holding on other grounds, did not explicitly state whether the evidence established causation. The opinion quoted a doctor's testimony that Eliker's injury could have been caused by a cough or a sneeze. It was, however, the opinion of the same doctor that the injury was "definitely related to his work activity." 195 Neb. at 159, 237 N.W.2d at 134. Justice McCown, in a dissenting opinion, noted that the only medical testimony on the record was "that the injury was, in fact, caused by the employment." *Id.* at 161, 237 N.W.2d at 135.
22. *See, e.g.*, Kastanek v. Wilding, 181 Neb. 348, 148 N.W.2d 201 (1967); Meadows v. Skinner Mfg. Co., 178 Neb. 856, 136 N.W.2d 184 (1965); Carranza v. Paine-Larson Furniture Co., 165 Neb. 352, 85 N.W.2d 694 (1957).
23. Reis v. Douglas County Hosp., 193 Neb. 542, 549, 227 N.W.2d 879, 884 (1975); Appleby v. Great Western Sugar Co., 176 Neb. 102, 106, 125 N.W.2d 103, 106 (1963).
24. *See* Reis v. Douglas County Hosp., 193 Neb. 542, 549, 227 N.W.2d 879, 884 (1975); Johnson v. Hahn Bros. Constr., 188 Neb. 252, 257, 196 N.W.2d 109, 112 (1972); Oline v. Nebraska Natural Gas Co., 177 Neb. 851, 860, 131 N.W.2d 410, 416 (1964).

is no fixed formula by which the question may be resolved.[25]

In *Eliker*, the court stated that the issue was controlled by the decision in *Reis v. Douglas County Hospital*.[26] In that case, the plaintiff sought compensation for a heart attack which occurred at home, and which, according to her doctor's testimony, was caused by her activities as a hospital personnel director. The court denied compensation on the grounds that the "arising out of" and "in the course of" requirements were not met:

> Nowhere have we been able to find any testimony indicating that the plaintiff had suffered any myocardial infarction or chest pains at her place of employment, or while performing services for her employer. This, we believe, is a fatal deficiency.[27]

This holding followed the rule of an earlier case, *Hammond v. Doctor's Hospital*,[28] where a claimant was denied compensation for an infection resulting from a pin prick, on the ground that the plaintiff had no recollection of when she pricked her finger. The court held that she had not met the "arising out of" and "in the course of" requirements, there having been no evidence as to when, how, and where the injury occurred.

Eliker's testimony, which was apparently consistent, uncontradicted, and credible, established that the onset of the injury occurred while the plaintiff was at work, performing his usual duties, during his regular hours of employment. Thus the "fatal deficiency" of the *Reis* case was not present, and it is unclear how that case can be considered as controlling precedent for the decision in *Eliker*.[29] Rather than representing an extension of the holding in *Reis*, the decision reflects a new interpretation of the "arising out of" and "in the course of" requirements.

Traditionally, the phrase "arising out of" has referred to the origin or cause of the accident.[30] Where an injury has occurred

25. Johnson v. Hahn Bros. Constr., 188 Neb. 252, 257, 196 N.W.2d 109, 112 (1972); Oline v. Nebraska Natural Gas Co., 177 Neb. 851, 860, 131 N.W.2d 410, 416 (1964).
26. 193 Neb. 542, 227 N.W.2d 879 (1975).
27. *Id.* at 551, 227 N.W.2d at 885.
28. 145 Neb. 446, 17 N.W.2d 9 (1945).
29. The applicability of *Reis*, a heart-attack case, is especially questionable considering the fact that the Nebraska supreme court has developed special requirements for heart-attack cases. In such cases, the plaintiff must show that the risk of heart trouble was greater while he was employed than it would have been if he had been unemployed. Conn v. ITL, Inc., 187 Neb. 112, 116, 187 N.W.2d 641, 643-44 (1971); Beck v. State, 184 Neb. 477, 480, 168 N.W.2d 532, 533 (1969).
30. *See* Johnson v. Hahn Bros. Constr., 188 Neb. 252, 257, 196 N.W.2d 109 112 (1972).

while the claimant was performing duties required by the employment and benefiting the employer, there usually has been no question that the injury arose out of the employment.[31] Thus, the evidence in *Eliker* as to the origin of the accident should have been sufficient to satisfy the "arising out of" requirement as interpreted in past decisions.

The "in the course of" concept refers to the time, place, and circumstances of the accident.[32] In prior cases, this requirement has been satisfied by showing that the injury occurred while the claimant was on the premises of the employer during working hours.[33] However, in *Eliker*, the court held that the plaintiff's proof failed:

> It is true that the plaintiff said that his neck pains came on suddenly while at work. . . . There is no evidence, however, as to exactly what he was doing at the time of the onsent of the pain.
>
> . . . .
>
> To hold for the plaintiff herein would require us by judicial fiat to legislate out the requirement that the claimant prove the accident occurred in the course of his or her employment.[34]

The court's holding in effect reinstated the requirement of an external event that had been legislated out of compensation law by the 1963 amendment of the definition of "accident." Requiring specific proof of what events preceded the accident may be beneficial as an aid to the employer in defending against the plaintiff's claim and in limiting the potential for fraudulent claims. However, where there is clear and uncontradicted evidence that the injury was work-connected, compensation should be allowed if the beneficent purposes of the act are to be fulfilled.[35]

D. Standard of Review

Under the provisions of the Workmen's Compensation Act in effect at the time *Eliker* was decided, a compensation case was

31. The concept has been expanded to include all acts performed within the scope of the employment. Thus, reasonable measures taken by an employee for personal convenience are considered as arising out of the employment. Uzendoski v. City of Fullerton, 177 Neb. 779, 782, 131 N.W.2d 193, 196 (1964).
32. Johnson v. Hahn Bros. Constr., 188 Neb. 252, 257, 196 N.W.2d 109, 112 (1972).
33. Uzendoski v. City of Fullerton, 177 Neb. 779, 781, 131 N.W.2d 193, 195 (1964).
34. 195 Neb. at 160-61, 237 N.W.2d at 134-35.
35. Thomsen v. Sears Roebuck & Co., 192 Neb. 236, 243, 219 N.W.2d 746, 750 (1974); Runyan v. State, 179 Neb. 371, 376, 138 N.W.2d 484, 488 (1964).

initially heard by a single judge of the compensation court and could be appealed either to the compensation court en banc or to the district court. In either case, the rehearing was de novo and a record was made. If the rehearing was by the compensation court en banc, appeal could then be taken to the district court, and any district court decision could be appealed to the Nebraska supreme court. In 1975, the legislature amended the Workmen's Compensation Act to provide for direct appeal to the supreme court from rulings by the compensation court en banc.[36]

In early cases, appellate review was in the nature of an error proceeding at the district court level, but the supeme court review was de novo upon the record.[37] Even so, the court developed the rule that where conflicting evidence was resolved at the trial level according to the demeanor and credibility of witnesses, those findings would be considered correct on de novo review in the supreme court.[38]

In a 1971 case, *Gifford v. Ag Lime, Sand & Gravel Co.*,[39] the court held that, pursuant to a 1953 amendment to the statute regarding the standard of review on appeal to the supreme court, such appeals should no longer be decided de novo upon the record:

> De novo review implies an independent determination of the facts without restriction by any previous factual determinations made in the lower court. While the distinction may be a technical one, it is nevertheless a vital one. Appellate courts do not ordinarily determine factual issues de novo except when required by statute. We therefore hold that on appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evi-

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36. *See* Act of May 9, 1975, LB 187, § 14, [1975] Neb. Laws 351, *amending* NEB. REV. STAT. § 48-185 (Reissue 1974) (now NEB. REV. STAT. § 48-185 (Cum. Supp. 1976)).
37. The criteria for allowing a modification of the district court award by the supreme court were as follows:
> (1) The court acted without or in excess of its powers, (2) the judgment order or award was procured by fraud, (3) the findings of fact are not supported by the evidence as disclosed by the record, and, if so found, the cause shall be considered de novo upon the record, . . . (4) the findings of fact by the court do not support the order or award.

Act of Mar. 23, 1957, ch. 207, § 1, [1957] Neb. Laws 726 (repealed 1975). Under this statute, cases were reviewed in the supreme court de novo upon the record. *See* Schoenrock v. School Dist., 179 Neb. 621, 139 N.W.2d 547 (1966); Runyan v. State, 179 Neb. 371, 138 N.W.2d 484 (1964); Werner v. Nebraska Power Co., 149 Neb. 408, 31 N.W.2d 315 (1948).
38. *See* Meadows v. Skinner Mfg. Co., 178 Neb. 856, 136 N.W.2d 184 (1965).
39. 187 Neb. 57, 187 N.W.2d 285 (1971).

> dence to support the findings of fact in the trial court, the judgment, order or award will not be modified or set aside for insufficiency of the evidence.[40]

In *Eilker*, consistent and uncontradicted evidence supported the findings of fact leading to the award of compensation. Under the standard of review set out in *Gifford*, the case should have been affirmed, but the court reversed without mentioning the *Gifford* case. As Justice McCown stated in his dissenting opinion:

> Only factual issues are involved here. Both the Workmen's Compensation Court en banc and the District Court, on appeal, determined those factual issues in favor of the claimant, and there is reasonable competent evidence in the record to support these findings of fact. . . . The opinion ignores the rules set out by this court in *Gifford v. Ag Lime, Sand and Gravel*.[41]

Along with providing for direct appeal to the supreme court from rulings by the compensation court en banc, the 1975 amendments to the Workmen's Compensation Act included a modification of the standard of review on appeal. No provision was made for de novo review in the supreme court, and the intended effect was to limit review to questions of law.[42] If *Eliker* means that the court is likely to reconsider factual determinations made by the trial court, the result could impair the intent of the direct appeal amendment to encourage speedy resolution of cases and avoid unnecessary delay and expense,[43] because more parties may appeal if there is a chance for a reconsideration of the facts. However, if the court construes the revised standard of review provision in accordance with the legislative intent to limit review to errors of law, *Eliker* will have little effect on the standards for reviewing factual determinations.

IV. CONCLUSION

In *Eliker*, the court held that in order to satisfy the "in the course of employment" requirement of the Workmen's Compensation Act the claimant must show exactly what activity he was engaged in at the time of the injury. Proof that the claimant was

40. *Id.* at 63-64, 187 N.W.2d at 289. The court in the past has consistently applied this standard. *See* Smith v. Ruan Transp., Inc., 190 Neb. 509, 512, 209 N.W.2d 146, 149 (1973); Hartwig v. Educational Serv. Unit No. 13, 189 Neb. 339, 341, 202 N.W.2d 618, 620 (1972); Swartz v. Hess, Inc., 188 Neb. 542, 545, 198 N.W.2d 64, 66 (1972); Bole v. S.M.S. Trucking Co., 187 Neb. 341, 342, 190 N.W.2d 780, 781 (1971).

41. 195 Neb. at 161, 237 N.W.2d at 135.

42. *See Hearings on LB 187 Before the Comm. on the Judiciary*, 84th Neb. Leg., 1st Sess., at 26 (1975).

43. *See id.* at 27.

performing his usual duties on the premises of the employer during the hours of employment was found insufficient to establish a temporal and space nexus with the employment. Although the actual effect of the case may be limited by the fact that in most instances the plaintiff will be able to introduce evidence of the specific activity he was engaged in at the time of the injury, the holding does represent a new interpretation of the "in the course of employment" concept.

The effect of the ruling on the standard of review in compensation cases will depend upon the court's interpretation of the recent amendments to the statute calling for review on questions of law only. However, the court's ruling did circumvent the well-established standard set down in the *Gifford* case, without so much as mentioning that case. If in future cases the court reconsiders the facts of compensation cases on appeal, the intended effect of the direct appeal amendment may be frustrated.

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